

THE PITTSBURG & MIDWAY COAL MINING CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-378

Decided February 22, 1989

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer vacating Notice of Violation No. 85-02-107-10. TU 6-35-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally-- Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Specificity

When a permittee has been cited for a violation of 25 CFR 216.105(i), concerning rills and gullies, the question of whether vegetation has been "established" within the meaning of that regulation is not governed by the revegetation requirements of 25 CFR 216.110.

In the absence of any applicable regulation, or other agency guidance, providing a definition for "established," a dictionary definition of established may be applied.

APPEARANCES: Stuart A. Sanderson, Esq., Office of the Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement; John A. Bachmann, Esq., Englewood, Colorado, for the Pittsburgh & Midway Coal Mining Company.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Office of Surface Mining Reclamation and Enforcement (OSMRE) has timely appealed from a February 26, 1987, decision of Administrative Law Judge Harvey C. Sweitzer, vacating Notice of Violation (NOV) No. 85-02-107-10, issued to the Pittsburgh and Midway Coal Mining Company (P&M), pursuant to section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271(a)(3) (1982), for a violation of 25 CFR 216.105(i). Judge Sweitzer concluded that the cited regulation was inapplicable and vacated the NOV.

On November 18, 1985, following an inspection of P&M's McKinley Mine in McKinley County, New Mexico, OSMRE inspector Rade H. Orell issued the NOV in question for "[f]ailure to fill, grade or otherwise stabilize rills and gullies deeper than 9 inches" (Exh. R-1 at 2). The NOV cited 25 CFR 216.105(i) as the regulation which had been violated and Pit 2 Ramp F (Ramp 2F) as the location of the violation. ^{1/} The inspector required P&M to either comply with 25 CFR 216.105(i) "such that the rill and gully problem at Pit 2 Ramp F is filled, graded, or otherwise stabilized" or "[s]ubmit a plan for approval, describing alternate methods for stabilizing the area and complete the required activities after approval" (NOV at 2).

P&M filed an application for review of the NOV on December 17, 1985, and an application for temporary relief from the NOV on January 9, 1986. On March 13 and 14, and April 9 through 11, 1986, Judge Sweitzer held a hearing in Lakewood, Colorado. In a ruling from the bench on April 11, 1986, Judge Sweitzer granted P&M's application for temporary relief (Tr. 688). OSMRE did not seek review of that determination. However, it filed the present appeal from Judge Sweitzer's February 26, 1987, decision.

The regulation cited in the NOV, 25 CFR 216.105(i), provides:

Regrading or stabilizing rills and gullies. When rills or gullies deeper than 9 inches form in areas that have been regraded and the topsoil replaced but vegetation has not yet been established, the permittee shall fill, grade, or otherwise stabilize the rills and gullies and reseed or replant the areas according to | 216.110. The regulatory authority shall specify that rills or gullies of lesser size be stabilized if the rills or gullies will be disruptive to the approved postmining land use or may result in additional erosion and sedimentation.

Ramp 2F, which is 1,600 feet long and approximately 67 feet wide, is located at the lowest level in a 44-acre watershed (Tr. 100, 134, 431, 448; Exh. P&M 1). Prior to mining, an arroyo 15- to 20-feet deep existed at the site of Ramp 2F (Tr. 520). During mining activities in the area, P&M used Ramp 2F as a haul road. In mid to late October 1984, following regrading and topsoiling, P&M reseeded the ramp. Between the time of reseeding and issuance of the NOV in November 1985, runoff from the watershed created a drainage feature along the length of the ramp (Tr. 420, 586). The depth of the drainway ranges from a few inches to as much as 2 feet (Tr. 521). The OSMRE inspector testified that he issued the NOV because gullies in excess of 9 inches existed on Ramp 2F (Tr. 26, 60).

At the hearing and in its posthearing brief, OSMRE concentrated on establishing that drainage had created rills and gullies that were deeper

^{1/} Since Ramp 2F is located on Indian lands within the meaning of section 701(9) of the Act, 30 U.S.C. | 1291(9) (1982), the applicable regulations are found at 25 CFR Part 216. The initial program regulatory requirements for backfilling and grading of disturbed areas on Indian lands and non-Indian lands are identical. See 25 CFR 216.105(i); 30 CFR 715.14(i).

than 9 inches; vegetation had not been established; and the rills and gullies had not been stabilized. In arguing that vegetation had not been established, OSMRE sought to invoke the standards for measuring the success of revegetation set forth at 25 CFR 216.110(f), specifically the requirement that the necessary vegetation be in existence for two growing seasons. Although admitting the depth of the drainage feature, P&M insisted that no rills and gullies within the meaning of 25 CFR 216.105(i) had been created, but, instead, the ramp was a reclaimed drainway. It further contended that the drainway was stabilized. It also asserted that 25 CFR 216.110(f) did not provide the standard for judging whether vegetation had been established and that vegetation had been established within the meaning of 25 CFR 216.105(i).

In his February 26, 1987, decision, Judge Sweitzer found that OSMRE's reliance on 25 CFR 216.110(f) was misplaced because that regulation could not apply unless there was a failure to establish vegetation. He stated that success of revegetation and establishment of vegetation were not interchangeable concepts, and he invoked the plain meaning of establish, "to introduce and cause to grow and multiply," as set forth in Webster's Ninth New Collegiate Dictionary 425 (1985), to find

[t]hat vegetation was established on Ramp 2F. Because of this finding, P&M is not required to perform remedial measures in the Ramp 2F area. Indeed, hearing evidence reveals the disputed drainage feature is stable. Rocks in the drainage feature's bottom protect against further erosion * * *. Furthermore, the drainage feature does not jeopardize the area's postmining land use (Tr. 461-63).

(Decision at 5).

Judge Sweitzer concluded that: "The disputed drainage feature occurs along a premining drainage way where vegetation was established. Because vegetation was established, 25 CFR 216.105(i), the NOV's cited regulation, is inapplicable. NOV No. 85-02-107-10 is hereby vacated" (Decision at 5-6).

OSMRE asserts on appeal that Ramp 2F is not a reclaimed drainage way, such that an exception allowing the formation of rills and gullies would apply, 2/ because, although the ramp was the site of a premining drainway, P&M "never attempted to reestablish or reclaim the drainage channel which existed prior to mining," rather P&M allowed the water to wend its way down

2/ The exception is found in the language of the preamble to the final rulemaking for the non-Indian lands initial program regulations, specifically 30 CFR 715.14(i). At 42 FR 62645 (Dec. 13, 1977), the preamble provides, "Rills and gullies formed along disturbed and reclaimed drainage ways will be permitted if vegetation has first been established." Because 30 CFR 715.14(i) is identical to 25 CFR 216.105(i) (see note 1, supra), the preamble language is equally applicable to each provision.

the ramp area and create its own channel (OSMRE Brief at 11). OSMRE also contends that in order for vegetation to be "established" in accordance with 25 CFR 216.105(i), either the standard of 25 CFR 216.110(f) must be met or the vegetation must be capable of controlling erosion. Thus, maintains OSMRE, Judge Sweitzer incorrectly applied a dictionary definition of "establish." Finally, OSMRE argues that its prima facie burden regarding

a violation of 25 CFR 216.105(i) is satisfied by showing that rills and gullies deeper than 9 inches are present, and that it has no obligation to show instability because the existence of rills and gullies of such a depth is a strong indication that the soil surface is not stable with respect to erosion. The operator must show that vegetation has been established, OSMRE asserts.

P&M supports Judge Sweitzer's decision and asserts that OSMRE's burden of proof argument is inconsistent with the position taken by OSMRE in its response, published in the Federal Register, to a petition for rulemaking related to 25 CFR 216.105(i) and OSMRE's official policy set forth in a document approved by the Acting Director, OSMRE, on July 7, 1987, entitled "Interpretation of Initial Program and Indian Lands Regulations Concerning Rills and Gullies."

On April 30, 1987, Peabody Coal Company filed the petition for rulemaking referred to by P&M. In a notice published in the Federal Register on September 11, 1987, OSMRE denied that petition. 52 FR 34394 (Sept. 11, 1987). Peabody had proposed that OSMRE amend its regulations at 30 CFR 750.16 to authorize all surface coal mining operations on Indian lands to comply with the surface stabilization requirements of 30 CFR 816.95, 3/ rather than requiring existing operations which had not been issued a permanent program permit pursuant to 30 CFR Part 750 to adhere to the 25 CFR Part 216 requirements, including the regulation at 25 CFR 216.105(i).

The basis for denial was OSMRE's determination that the principal difference between the regulations at 30 CFR 816.95 and 25 CFR 216.105(i) was that "the latter prescribes a specific numerical depth at which the presence of unstabilized rills and gullies constitute a definite violation on areas where vegetation has not been reestablished," and that proper application of the provisions of 25 CFR 216.105(i) in accordance with the July 9, 1987, policy directive would render any differences between the regulations insignificant. Id. at 34395.

3/ That regulation provides as follows:

"(a) All exposed surface areas shall be protected and stabilized to effectively control erosion and air pollution attendant to erosion.

"(b) Rills and gullies, which form in areas that have been regraded and topsoiled and which either (1) disrupt the approved postmining land use or the reestablishment of the vegetative cover, or (2) cause or contribute to a violation of water quality standards for receiving streams shall be filled, regraded, or otherwise stabilized; topsoil shall be replaced; and the areas shall be reseeded or replanted."

The cited policy directive provides:

Observation of a rill or gully is not itself evidence that erosion is presently occurring or that site utility is being impaired. Where an erosional channel appears stabilized, based upon an evaluation of the channel characteristics discussed above, and the channel does not interfere with postmining land use, the permittee should be advised to monitor the site for any change in status, but should not be required to take any corrective action.

(July 9, 1987, directive at 3).

Thus, despite OSMRE's claim in this appeal that its *prima facie* case is limited to showing that rills and gullies of more than 9 inches in depth exist on the site, OSMRE's policy directive and the response to the petition for rulemaking indicate that only unstable rills and gullies constitute a violation, unless they interfere with the post mining land use. ^{4/} OSMRE's policy pronouncement is consistent with the Board's interpretation of 30 CFR 715.14(i) in Palmer Coking Coal Co. v. OSMRE, 96 IBLA 266, 268 (1987), in which we stated:

OSMRE argues that the presence of such channels by itself establishes that Palmer failed to comply with the regulations. We disagree. In reclaiming an area disturbed by mining, there is a period of time before revegetation stabilizes the newly replaced topsoil to the point that little or no erosion takes place. Cf. 30 CFR 715.20. During that time period, some erosion will inevitably occur, but it must be minimized. We conclude that that is the aim of 30 CFR 715.14(i). Indeed, the regulation provides that as an alternative to filling and grading, a permittee may "otherwise stabilize" rills or gullies. 30 CFR 715.14(i). That is, rills or gullies, which have already formed, may be left in place as long as they are "stabilize[d]."

Moreover, it is absolutely clear that the regulation is applicable only when vegetation has "not yet been established." Thus, to present a *prima facie* case of a violation of 25 CFR 216.105(i), OSMRE must show the existence of rills or gullies at least 9 inches in depth; that they exist in an area where vegetation has not yet been established; and that they are not stable. At the hearing OSMRE submitted evidence in support of each of these. However, P&M clearly established by a preponderance of the evidence that the cited regulation was inapplicable.

[1] Judge Sweitzer properly rejected OSMRE's claim that 25 CFR 216.110(f) controls the question of whether or not vegetation has been established. Careful reading of the language of 25 CFR 216.105(i), the cited regulation, reveals that the reference to section 216.110 applies

^{4/} The evidence does not show, nor does OSMRE argue, that the drainage way in question would interfere with the postmining use of the land.

only upon a showing that "vegetation has not yet been established." As stated by Judge Sweitzer, "For 216.110 to apply, a threshold determination that vegetation was not established must be made" (Decision at 4). To impose the requirements of section 216.110 on that determination is, we find, insupportable. To show the fallacy of applying that regulation in this particular case, one need only turn to Judge Sweitzer's statement in his decision that

25 CFR 216.110(f) requires approved reference areas by which to assess revegetative success. However, there is no approved reference area by which to determine Ramp 2F's revegetative success (Tr. 71). It is unreasonable for OSMRE to rigidly apply 216.110(f)(2)'s two growing season requirement where no approved reference area exists.

(Decision at 5).

The NOV issued to P&M does not mention 25 CFR 216.110, and neither the corrective actions specified in the NOV nor the description of the violation imply that the revegetation standards of section 216.110 were of concern to OSMRE. Cf. Old Ben Coal Co., 2 IBSMA 38, 87 I.D. 119 (1980) (notice of violation failed to set forth with reasonable specificity the nature of the alleged violation). Consequently, we hold that OSMRE's attempt to incorporate the requirements of 25 CFR 216.110 in 25 CFR 216.105(i), as the standard by which to judge whether vegetation had been established, was improper.

In the absence of any applicable regulation, or other agency guidance, providing a definition for "established," we find that Judge Sweitzer's use of the dictionary definition of "establish" was appropriate. 5/ P&M seeded Ramp 2F in October 1984 with a mixture of nine perennial species and mulched the area with 2-1/2 tons of mulch per acre (Tr. 503-04, 513). Germination took place and vegetation grew in 1984 and 1985 (Tr. 83, 427-28). Testimony and exhibits presented at the hearing reveal the presence of healthy vegetation on Ramp 2F (Tr. 58, 75, 77-83, 129-31, 435, 440, 452, 456, 514-15; Exhs. R-5 through R-9; Exhs. P&M S-6 through P&M S-12). The evidence shows that at the time OSMRE issued the NOV in question, vegetation had been established on Ramp 2F. 6/ Therefore, we must agree with Judge Sweitzer's conclusion that 25 CFR 216.105(i) is inapplicable.

5/ We note that in In Re Lick Gulch Timber Sale, 72 IBLA 261, 90 I.D. 189 (1983), the Board had occasion to refer to a Bureau of Land Management (BLM) definition of "established" in the context of reforestation. Therein we stated: "A stand of timber is said to be 'established' if it consists of suitable growing trees, having survived at least one growing season, and 'which are past the time when considerable juvenile mortality occurs.' BLM Manual 5705.05H (Oregon State Office Supplement)." Id. at 285, 90 I.D. at 203 (footnote omitted). We are not aware of any OSMRE definition of "established" applicable to the backfilling and grading regulations in 25 CFR 216.105.

6/ Having determined that vegetation had been established, we also find that the evidence supports P&M's claim of an exception for premining

Moreover, even if vegetation had not been established, the evidence in this case does not support the issuance of the NOV because, although OSMRE required P&M to fill, grade, or otherwise stabilize the rills and gullies, the drainage feature had been stabilized at the time the NOV was issued. OSMRE stipulated to P&M's calculations regarding the stability of the drainage channel, and those calculations showed the channel to be self-armored and stabilized (Tr. 626, 633-35, 649, 658). In addition, as noted by Judge Sweitzer, rocks in the bottom of the channel protected against further erosion (Decision at 5, citing various pages of the hearing transcript and exhibits). Therefore, we also agree with Judge Sweitzer's finding that the channel was stabilized.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Bruce R. Harris
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

fn. 6 (continued)

drainage ways (see note 2, supra). OSMRE's contention on appeal that P&M was required to design and seek approval for a drainage channel, rather than merely to recontour the ramp area and allow the runoff to seek its own channel, is without merit. OSMRE cites no legal basis for that position. In fact, the OSMRE inspector testified that he knew of no requirement in the applicable regulations requiring the design of drainways (Tr. 92-93, 97-98). Furthermore, Wayne Robert Erickson, P&M's General Environmental Supervisor at the McKinley Mine, stated that the drainway methodology employed at Ramp 2F had been utilized by P&M at the McKinley Mine for at least 6 or 7 years, and, in fact, had been approved for use by OSMRE in P&M's permanent program permit at the McKinley Mine (Tr. 470-71).